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PREMALLA NAVANTHAPANY SAMY v. TETUAN OTHMAN HASHIM & CO & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[CIVIL SUIT NO: WA-22NCVC-270-06-2020]
B 13 DECEMBER 2022

Abstract – *A reasonable and competent solicitor would take all the evidence, legal proposition and the narrative of the case into account when he/she advises a client as to whether an appeal should be pursued. Having done so, the solicitor can then be said to have discharged his/her duties to the client to act in the client's best interest. The solicitor cannot later be made liable for negligence for advising the client against appealing when, in reality, the case itself has no credible chance of success if appeal is pursued.*

TORT: *Negligence – Professional negligence – Claim against solicitors – Client's claim dismissed by High Court – Allegation that solicitors forced client not to appeal against decision of High Court – Whether solicitors admitted to act of negligence and agreed to compensate client for losses suffered – Whether allegations proven – Whether client had credible chance of success if solicitors proceeded to appeal against decision of High Court – Whether claim pursued based on unlawful instrument*

LEGAL PROFESSION: *Duty of care – Negligence – Client's claim dismissed by High Court – Allegation that solicitors forced client not to appeal against decision of High Court – Whether solicitors admitted to act of negligence and agreed to compensate client for losses suffered – Whether allegations proved – Whether client had credible chance of success if solicitors proceeded to appeal against decision of High Court – Whether claim pursued based on unlawful instrument*

One Normawati Ahmad Megat was the registered proprietor of a landed property. The purchase of the property was financed by a loan or facility obtained from RHB Bank. A charge was entered on the title of the property in favour of RHB Bank. The plaintiff had provided Normawati a personal loan in the total sum of RM290,000. The plaintiff and Normawati had also executed a sale and purchase agreement ('SPA'). Normawati did not comply with the said SPA and instead, she lodged police reports against the plaintiff's husband, alleging that she was forced to sign the documents concerning the SPA and that they were wrongly evicted from the property. Normawati, however, did not service the facility or her loan with RHB Bank. This led to the foreclosure of the property and an auction was undertaken by RHB Bank. A proclamation of sale was issued by RHB Bank and the public auction of the property was undertaken. My Home Properties Sdn Bhd ('MHPSB') was the successful bidder and had purchased the property. The plaintiff instituted proceedings against Normawati ('Suit 451') seeking, *inter alia*, an

order for Normawati to comply with the terms of the SPA. Summary judgment was obtained against Normawati. The plaintiff then instituted proceedings against MHPSB, claiming that she should be declared as the owner of the property instead of MHPSB ('Suit 373'). MHPSB counterclaimed and also instituted proceedings against the plaintiff and Normawati seeking, *inter alia*, an order to impeach the order of the court in Suit 451 ('Suit 188'). Suits 373 and 188 were heard together. The High Court made the following pertinent findings: (i) Premalla (the plaintiff herein) failed to notify RHB Bank about the SPA and left it to Normawati to do so even though Premalla had paid the full purchase price to Normawati; (ii) the solicitor for MHPSB wrote to Premalla's solicitors, informing her that MHPSB was the successful bidder and had paid the full auction price and asked Premalla to withdraw the private caveat; and (iii) this piece of fact was a material fact which needed to be brought to the attention of the High Court before the decision in the application for summary judgment was delivered. It was the duty of Premalla or her solicitor to do so and the act of withholding this material fact amounted to fraud. Based on the above findings, the court allowed MHPSB's claim in Suit 188 and counterclaim in Suit 373. The claim against MHPSB by Premalla was dismissed. The plaintiff then claimed against the defendants for negligence and breach of fiduciary duty by forcing the plaintiff not to appeal against the decision of the High Court that had dismissed her claim in Suit 373 and allowed MHPSB's claim against her in Suit 188. According to the plaintiff, (i) the defendants were motivated by their intention to prevent the judge to deliver his written grounds that would indicate or state that the order for specific performance obtained in Suit 451 against Normawati was set aside due to the fraud by the second defendant; (ii) the advice given by the defendants was therefore negligent and in breach of their fiduciary duties as the opinion was motivated by the intention of the defendants to ensure that the fraudulent conduct of the second defendant was not produced into a written grounds of the trial judge; (iii) the second defendant did admit to the act of negligence and agreed to compensate the plaintiff the sum of RM460,000 for the losses suffered by her. However, the defendants reneged on the promise and instead only agreed to pay the sum of RM290,000; and (iv) the second defendant also attempted to purchase the property from MHPSB and had even paid the company RM70,000 but failed due to the restriction imposed on the property pursuant to the terms of the auction.

Held (dismissing appeal):

(1) The plaintiff failed to prove her claim against the defendants. On the balance of probabilities, the plaintiff did not discharge the burden of proof to show that the defendants were negligent or in breach of their fiduciary duties to the plaintiff. Further, the defendants did not admit to the breach of the duties owed by them to the plaintiff and did not promise to pay the plaintiff the sum of RM490,000 as claimed by the plaintiff. (paras 38-40)

(2) MHPSB's title was derived from the charge lodged over the property by RHB Bank. The charge was lodged on 8 June 2004 whereas the plaintiff's caveat was only entered on 30 April 2015. MHPSB, when it purchased the said land at the public auction, would have derived its title from the charge held by RHB Bank. Any dealing on the land *via* any third party, even through the proprietor of the land, would be subject to the registered charge held by RHB Bank and eventually subject to the title held by MHPSB. This even applied to any party who lodged a subsequent caveat over the said land. The law in this area was crystal-clear. It was irrefutable that the title claimed by MHPSB took precedent over that claimed by the plaintiff. (paras 52 & 53)

(3) It was most likely than not that the defendants would have advised the plaintiff that the chances of success of the appeal were slim and that she should not proceed with the appeal. The evidence indicated that the defendants did discharge their duties to the plaintiff. The defendants did not breach their duty of care to the plaintiff. The evidence, the legal propositions and the contemporaneous documents suggested that the appeal would have failed in any event. It was appropriate for the defendants to give such advice to the plaintiff in view of the facts of this case. The plaintiff did not have any credible chance of success even if an appeal had been lodged to the Court of Appeal. (paras 80, 86 & 87)

(4) There was no sufficient evidence that the defendants' advice was predicated by the decision to hide any alleged fraud by the defendants. The said fraud as alleged, if any, had occurred and would not change even if the appeal was not pursued. It would not make any difference to the existence of the alleged 'fraud' as suggested by the plaintiff. The plaintiff failed to discharge its burden of proof to show that the defendants were negligent and had acted in breach of their fiduciary duty to her. There was also no evidence that the defendants had either put their interest first to that of the plaintiff or had concealed any information or facts that could be utilised by the plaintiff for the purpose of the trial or appeal. (paras 93, 98 & 99)

(5) The original transaction between the plaintiff and Normawati was a moneylending transaction. The conduct of the plaintiff did not bear the hallmarks of a genuine purchaser. The purported SPA between the plaintiff and Normawati was an unlawful instrument and contravened ss. 2 to 5 and 15 of the Moneylenders Act 1951 as well as ss. 24 and 25 of the Contracts Act 1950. As the said transaction was an unlawful transaction, the plaintiff was not entitled to pursue a claim based on the said unlawful instrument and this extended to any claim of negligence or breach of fiduciary duty against the defendants. (paras 127-130)

Case(s) referred to:

AIM Edition Sdn Bhd v. AmBank (M) Bhd [2019] 9 CLJ 127 HC ***(refd)***
Armagas Ltd v. Mundogas (The Ocean Frost) [1985] 1 Lloyd's Rep 1 ***(refd)***
Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***
Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2022] 2 CLJ 1 FC ***(refd)***
Bray v. Ford [1896] AC 44 ***(refd)***
Bristol and West Building Society v. Mothew [1996] EWCA Civ 533 ***(refd)***
CB Media Sdn Bhd & Anor v. Kesas Sdn Bhd [2019] 4 CLJ 609 CA ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Gestmin SGPS (SA) v. Credit Suisse (UK) Ltd [2013] EWHC 3560 ***(refd)***
Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd [2020] 6 CLJ 1 CA ***(refd)***
Golden Wheel Credit Sdn Bhd v. Dato' Siah Teong Din [2021] 9 CLJ 461 HC ***(refd)***
Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd [1992] 4 CLJ 2212; [1992] 1 CLJ (Rep) 112 SC ***(refd)***
Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***
Keech v. Sandford [1726] Sel Cas T King 61 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***
Lee Ah Kong v. Ong & Company [2011] 5 CLJ 296 HC ***(refd)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***
Mahmood Ooyub v. Li Chee Loong & Other Appeals [2020] 1 LNS 660 CA ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Mount v. Barker Austin [1998] EWCA Civ 277 ***(refd)***
Mui Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***
Muthiah Ramasamy v. Muguthan Vadiveloo [2022] 7 CLJ 940 HC ***(refd)***
QM Resources Sdn Bhd v. Parade Hotel Sdn Bhd & Ors [2020] 5 CLJ 182 CA ***(refd)***
Rohaya Ali Haidar v. AmBank (M) Bhd [2016] 4 CLJ 563 CA ***(refd)***
Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [1997] 2 CLJ 58 SC ***(refd)***
Tenaga Nasional Bhd v. Tetuan Ariff & Co [2014] 1 CLJ 1112 HC ***(refd)***
Unsung Rasad v. PP [2019] 1 LNS 662 CA ***(refd)***
Vimala Sangari R Nathan v. Loh Chen Yook [2018] 4 CLJ 210 CA ***(refd)***
Wetton v. Ahmed (Also Known As Mumtaz Properties Ltd) [2011] EWCA Civ 610 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 25
Evidence Act 1950, ss. 101, 102
Moneylenders Act 1951, ss. 2, 2A, 3, 4, 4A, 5, 15
National Land Code, s. 267

For the plaintiff - Zaid Malek; M/s Daim & Gamany
For the defendants - Wong Hok Mun; M/s Azim, Tunku Farik & Wong

Reported by Lina E

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JUDGMENT

Mohd Arief Emran Arifin JC:

Introduction

Summary Of The Pleaded Case Against The Defendants

B

[1] The plaintiff claims that the defendants were negligent:

(i) By forcing her not to appeal against the decision of the High Court that had dismissed her claim against My Home Properties Sdn Bhd in the suit bearing number BA-22NCVCV-373-06/2016 that was delivered on
C 11 March 2019.

(ii) By forcing her not to appeal against the decision of the High Court that had allowed My Home Properties Sdn Bhd's claim against her in the suit bearing number BA-22NCVC-188-03-03/2017 that was delivered on 11 March 2019.

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(iii) The plaintiff alleges that the defendants were motivated by their intention to prevent the learned judge to deliver his written grounds that would indicate or state that the order for specific performance obtained earlier in the suit bearing number BA-22NCVC-451-08/2015 against Normawati binti Megat Ahmad is set aside due to the fraud by the
E second defendant.

(iv) The advice given by the defendants was therefore negligent and in breach of their fiduciary duties as the opinion was motivated by the intention of the defendants to ensure that the fraudulent conduct of the second defendant is not produced into a written grounds of the learned
F trial judge in the above-referred suits.

[2] The plaintiff further claims that the defendants, or at least the second defendant, did admit to the said act of negligence at the meeting on 16 March 2019 and agreed to compensate the plaintiff the sum of RM460,000 for the
G losses suffered by her.

[3] The plaintiff also alleges that the defendants had subsequently reneged on the said promise and instead only agreed to pay the sum of RM290,000 subject to the conditions contained in the draft statutory declaration in the email dated 15 May 2019.

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[4] It was also contended that the second defendant had also attempted to purchase the property from My Home Properties Sdn Bhd and had even paid the said company the sum of RM70,000. This however failed due to the restriction imposed on the said property pursuant to the terms of the auction.

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[5] The plaintiff further contends that the defendants had breached their fiduciary duties to her by (i) failing to lodge the appeal against the decision of the court in both suits and (ii) providing the opinion not to appeal against the decision. These allegations are also based on the alleged conflict of interest relied on by the plaintiff as stated earlier.

[6] As a result, the plaintiff contends that she has loss her chance of arguing the appeal before the Court of Appeal and would have won her case entitling her to the property that now belongs to My Home Properties.

Summary Of The Defence

[7] The defendants admit that they owed a duty of care in tort and contract to the plaintiff as her solicitors in the aforesaid suits.

[8] The sale and purchase agreement of the property involving the plaintiff and Normawati binti Megat Ahmad ('Normawati') is a sham and is an illegal money-lending transaction. The said one-page agreement and the receipts were issued after the loan was granted by the plaintiff and the said sale and purchase agreement was as security for the said loan in case Normawati failed to repay the sums outstanding.

[9] The second defendant further states that he was not aware that the said agreement was a sham and believed the narrative represented to him by the plaintiff and her husband.

[10] The property in question was charged by Normawati to RHB Bank for the purchase of the said property and a charge was duly registered on 8 June 2004.

[11] The caveat over the said land was only registered by the plaintiff on 30 April 2015. I also note that the grounds for the entry of the said caveat are as follows:

> 1. Saya telah membeli hartanah yang dikenali sebagai HS(D) No. 96596, PT 25974, Mukim Petaling, Daerah Petaling, Negeri Selangor dengan harga RM290,000.00 ... Saya lampirkan di sini surat perjanjian jual beli bertarikh 5hb Januari 2015 dan dokumen bertulis bertarikh 1 hb Oktober 2014 oleh pemiliknya ....
>
> 2. Saya telah menyempurnakan bayaran berjumlah RM290,000.00 melalui pembayaran berperingkat ...
>
> 3. Akan tetapi setelah menerima wang pembelian sepenuhnya, pemilik hartanah tersebut ... telah gagal melangsaikan hutang kepada bank dan juga gagal untuk mengambil tindakan untuk memindahmilik hartanah tersebut kepada saya.

[12] Therefore, My Home Properties had precedence over the interest of the plaintiff. The title claimable by My Home Properties is derived from the charged registered over the land by RHB Bank Bhd which takes precedent over the interest, if any, of the plaintiff.

[13] In the circumstances, the defendants were not negligent in advising the plaintiff not to appeal against the decision of the courts in the two referred suits.

[14] The defendants further deny that they were motivated by any ulterior or personal motive as suggested by the plaintiff. They state that they had always acted in the best interest of the plaintiff.

[15] The defendants further state that the second defendant did not represent the plaintiff personally in the two suits but had been represented by one Leslie Bala. Leslie Bala had also advised the plaintiff or her husband that the chances of overturning the decision of the High Court were poor and should not be pursued.

[16] The second defendant also denies that he had admitted to the alleged claims at any meetings. Instead, he had promised to lend money to the plaintiff to enable her to purchase the property from My Home Properties Sdn Bhd.

[17] The second defendant also states that he had made the proposal contained in the draft statutory declaration and his WhatsApp to the plaintiff's husband for the purpose of resolving all of the issues pending between him and the plaintiff. The proposal was however rejected by the plaintiff and was not agreed to. He stressed that he did not at any time accept any form of liability as suggested by the plaintiff.

Facts Not In Dispute

[18] One known as Normawati binti Megat Ahmad is the registered proprietor of a landed property held under HS(D) No. 96596, PT 25974, Mukim Petaling, Daerah Petaling, Negeri Selangor.

[19] The purchase of the said property was financed by a loan or facility obtained from RHB Bank. As stated earlier, a charge was entered on the title to the said property in favour of RHB Bank on 8 June 2004.

[20] The plaintiff had provided to the said Normawati a personal loan totalling to the sum of RM290,000. The loan was provided to her *via* 13 payments starting from 6 July 2013 and the last of which was on 10 November 2014.

[21] The said Normawati and her husband, one known as Sazali bin Samsuki, had issued a document confirming the said receipt of the sum of RM290,000 and the alleged sale of the property to the plaintiff. This document was dated 1 October 2014.

[22] The plaintiff and Normawati also executed a one-page sale and purchase agreement dated 5 January 2015. Normawati however did not comply with the said sale and purchase agreement.

[23] Police reports were lodged against Ravindran a/l Kutty (the plaintiff's husband and a police officer with the rank of a DSP) by Normawati alleging that she was forced to sign the documents concerning the sale and purchase agreement and that they were wrongly evicted from the property. The reports were lodged on 17 February 2015 and 26 March 2015. Sazali bin Samsuri, the husband of Normawati, had also lodged another report against Ravindran on 17 February 2015 alleging that he had wrongfully removed vehicles owned by him from Normawati.

[24] Normawati did not however service the facility or her loan with RHB Bank. This led to the foreclosure of the property and an auction was undertaken by RHB Bank in accordance with the requirements of the National Land Code. A proclamation of sale was issued by RHB Bank and the public auction of the said property was undertaken on 16 May 2016. A valuation report was prepared by IPC Island Property Consultants Sdn Bhd dated 10 November 2017 valuing the market value property at about RM435,000 based on the assumption that the title is good and free from any legal encumbrance.

[25] My Home Properties Sdn Bhd was the successful bidder at the said public auction and purchased the property for the sum of RM280,000 on 16 May 2016.

[26] The notes of evidence in the 451 suit and the evidence before me in this suit, indicate that the plaintiff did attend the said auction but could not undertake her proposed bid to the property due to technical issues concerning the required deposit to be paid to the auctioneer.

[27] The plaintiff then instituted proceedings against Normawati in the civil suit bearing number 22NCVC-451-08/2015 (451 suit) seeking, *inter alia*, an order for the said Normawati to comply with the terms of the one-page sale and purchase agreement. Essentially, the plaintiff wanted the property to be transferred to her or in the alternative damages against Normawati.

[28] Summary judgment was obtained against Normawati as seen in the order dated 26 June 2016 in the aforesaid suit. I note however that the plaintiff did not disclose the existence of the order for sale obtained by RHB Bank and the subsequent purchase of the property by My Home Properties Sdn Bhd at the public auction.

[29] The plaintiff then instituted proceedings against My Home Properties Sdn Bhd in the civil suit bearing number BA-22NCVC-373-06/2016 (373 suit) claiming that she should be declared as the owner of the said property instead of My Home Properties. My Home Properties had also filed a counterclaim in this suit.

[30] My Home Properties also instituted proceedings against the plaintiff and Normawati in the civil suit bearing number BA-22NCVC-188-03/2017 (188 suit) seeking, *inter alia*, an order to impeach the order of the court in the 451 suit.

[31] The 373 and 188 suits were heard together before Justice Roslan bin Abu Bakar. After hearing the witnesses called in the said suits, the High Court decided in favour of My Home Properties and made the following pertinent finding on 11 March 2019 (which are summarised for convenience):

A (i) Madam Premalla failed to notify RHB Bank about the SPA and left it to Normawati to do so even though Madam Premalla had paid a full purchase price to Normawati.

(ii) On 23 June 2016, the solicitor for My Home Properties Sdn Bhd wrote to Madam Premalla's solicitors informing her that My Home Properties Sdn Bhd was the successful bidder and had paid the full auction price and asked Madam Premalla to withdraw the private caveat.

(iii) The court is of the view that this piece of fact is a material fact which needs to be brought to the attention of the MTSA before the decision in the application for summary judgment delivered on 28 June 2016.

(iv) And this is the duty of Madam Premalla or her solicitor to do so.

(v) The act of withholding this material fact amounts to fraud.

(vi) Based on those findings on the balance of probabilities, the court hereby allows My Home Properties Sdn Bhd's claim in the 188 suit and its counterclaim in the 373 suit.

(vii) The claim against My Home Properties Sdn Bhd by Premalla is dismissed.

[32] After the decision was delivered by the High Court as referred earlier, a meeting was arranged between the plaintiff's husband and the second defendant. This was arranged and held on 16 March 2019 and followed up with a second meeting on 20 March 2019. Parties however could not agree as to what was discussed and agreed to at these two meetings.

[33] The defendants then issued an email dated 15 May 2019 attaching a copy of a draft statutory declaration to be agreed by the plaintiff. The contents of the statutory declaration are, *inter alia*, as follows:

> ...
>
> (a) I waive my right of appeal against the High Court decision dated 11 March 2019 in Guaman No. BA-22NCVC-373-06/2016 heard together with Guaman No. BA-22NCVC-188-03/2017; and
>
> (b) I also waive all rights of action I may have against Datuk Kesavan P Krishnan, counsel Mr Leslie Bala and/or Messrs Othman Hashim & Co in the conduct of Guaman No. BA-22NCVC-373-06/2016 heard together with Guaman No. BA-22NCVC-188-03/2017 in the High Court at Shah Alam.
>
> I further irrevocably instruct Datuk Kesavan P. Krishnan to disburse the Agreed Sum as follows;
>
> (a) Pay costs of RM15,000.00 to My Home Properties Sdn. Bhd.;
>
> (b) Pay damages of RM55,000.00 to My Home Properties Sdn. Bhd.;
>
> (c) offset all legal fees, costs and disbursement due to Datuk Kesavan P. Krishnan of Messrs. Othman Hashim & Co in respect of;

(i) Summons No. 22NCvC-451-08/2015

(ii) Summons No. BA-52NCvC-23-01/2016

(iii) Summons No. BA-52NCVC-06-01/2016 (Shah Alam Session Court)

(iv) Summons No BA-A72NCVC-80-01/2016 (Shah Alam Magistrate Court);

(v) Summons No. BA-22NCVC-373-06/2016 heard together with Summons No.: BA-22NCVC-188-03/2017 (Shah Alam High Court);

(vi) Summons No. MA-B52NCVC-29-11/2018 (Melaka Sessions Court);

(vii) Summons No. MA-B52NCVC-30-11/2018 (Melaka Sessions Court);

(viii) Summons No. MA-A72NCvC-478-11/2018 (Melaka Magistrate Court)

(c) The balance to be paid to me upon full compliance of High Court Decision dated 11.03.2019 by the Shah Alam High Court referred above.

[34] The second defendant then issued a WhatsApp personally to the plaintiff's husband on 13 July 2019. Important parts of the said WhatsApp are as follows:

DSP Ravi,

This is my reply without prejudice. I would not dream of patronizing you. I said "alleged issue" due to my recollection of the facts as follows:

1. After the negotiation for purchase of the house fell through, you indicated to me that you were agreeable to my original proposal to pay your wife RM290,000.00 or the balance thereof.
2. Based on that agreement/understanding I prepared the SD for your wife to sign but she was in Sarawak.
3. When I called you in early May you said go ahead and pay RM70k to My Home Properties and that the SD is fair and would be followed up later.
4. Based on that belief I paid the RM70k to MHP.
5. My belief has always been, based on your word that the matter is settled hence my reference to "alleged issue".
6. I am ready for a proper amicable settlement. I would like to hear your proposal.

[35] The plaintiff did not agree to the contents of the statutory declaration and the proposal made by the defendants as contained in the said draft and in the second defendant's WhatsApp.

A **Trial Of This Suit**

[36] This claim was heard on 4 August 2021, 5 August 2021, 19 September 2022, 20 September 2022 and 21 September 2022.

[37] The following witnesses were called by parties:

B Plaintiff's witnesses

(i) Premalla a/p Navanthappany - PW-1

(ii) Ravindran a/l Kutty - PW-2

(iii) Md Jamil bin Kilat - PW-3

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Defendant's witnesses

(iv) Datuk Kesavan P Krishnan - SD-1

(v) Leslie Bala - SD-2

D **Decision Of This Court**

[38] After considering the pleadings, documents tendered by parties, evidence of the witnesses and submissions filed by counsels, I am of the opinion that the plaintiff has failed to prove her claim against the defendants.

E **[39]** I am of the opinion that, on the balance of probabilities, the plaintiff did not discharge the burden of proof to show that the defendants were negligent or in breach of their fiduciary duties to the plaintiff.

[40] I also find, on the balance of probabilities, that the defendants did not admit to the breach of the duties owed by them to the plaintiff and did not F promise to pay the plaintiff the sum of RM490,000 as claimed by the plaintiff.

[41] My reasons for dismissing the plaintiff's claim are contained in the following paragraphs.

G **Reasons For Dismissing The Plaintiff's Claim**

Pleaded Case Is Specific

[42] The plaintiff's claim against the defendants is specific. It is best that I reproduce the summary of the plaintiff's claim against the defendants:

H *Negligence And Breach Of Fiduciary Duty*

(i) By forcing her not to appeal against the decision of the High Court that had dismissed her claim against My Home Properties Sdn Bhd in the suit bearing number BA-22NCVCV-373-06/2016 that was delivered on 11 March 2019.

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(ii) By forcing her not to appeal against the decision of the High Court that had allowed My Home Properties Sdn Bhd's claim against her in the suit bearing number BA-22NCVC-188-03-03/2017 that was delivered on 11 March 2019.

(iii) The plaintiff alleges that the defendants were motivated by their intention to prevent the learned judge to deliver his written grounds that would indicate or state that the order for specific performance obtained earlier in the suit bearing number BA-22NCVC-451-08/2015 against Normawati binti Megat Ahmad is set aside due to the fraud by the second defendant.

(iv) The advice given by the defendants were therefore negligent and in breach of their fiduciary duties as the opinion was motivated by the intention of the defendants to ensure that the fraudulent conduct of the second defendant is not produced into a written ground of the learned trial judge in the above-referred suits.

Admission And Promise To Compensate

(v) The defendants admitted to the said breaches and promised to pay the plaintiff the sum of RM490,000 based on what allegedly transpired at the meetings between parties.

Alleged Breach Of The Fiduciary Duty And Alleged Negligence Against The Defendants

Alleged Failure To Properly Advice – Conflict Of Interest

[43] Firstly, the defendants admit that they had a duty of care and owed fiduciary duties to the plaintiff as they were her solicitors during the course of the 188 and 373 suits.

[44] The defendants admit that they had also advised the plaintiff that she should not appeal against the decision of the High Court in both suits. This appears in the examination in chief of Leslie Bala where he stated:

> Q8: Did you discuss an appeal with the plaintiff?
>
> A: The plaintiff and her husband attended every day of the trial. Only the husband was in court when the decision was delivered. Immediately after the decision was delivered, I spoke to the husband. I informed him not to appeal as an appeal would be an up-hill battle. I told him that MHP had rights that trumped theirs.

[45] It is unfortunate that the Leslie Bala or the second defendant did not put the said opinion or advice in writing. This failure of putting the advice or opinion into writing does not however mean that the defendants were negligent.

[46] The plaintiff's claim however is predicated on the allegation that the advice was not caused by the solicitor's belief in the strength or the probability of success of the appeal, but was allegedly caused by the

defendants' intention to hide their alleged fraud in failing to disclose the results of the public auction by RHB Bank and the eventual purchase of the property by MY Home Properties Sdn Bhd.

[47] I am however not convinced that the said defendants' advice was predicated by the said intention.

[48] I have considered the evidence of the plaintiff's witnesses which includes (i) Madam Premalla herself, (ii) Ravindran a/l Kutty and (iii) Md Jamil.

[49] These witnesses alleged that the second defendant had pleaded to them not to pursue the appeal to ensure that the second defendant's failure to inform the court of the existence of the auction and the subsequent purchase by My Home Properties Sdn Bhd. They contend that the second defendant wanted to hide his failure and to ensure that his reputation is not negatively affected by the said decision.

[50] I am not convinced by the evidence of these three witnesses and do not find their evidence on this issue as being credible. I prefer the evidence presented by the defendants' witnesses as their evidence is consistent with the contemporaneous documents, the actual legal position concerning the title to the said property at issue in the said 188 and 373 suits and the orders made by the court in the said suits.

The Plaintiff's Claim And Defence In The 188 And 373 Suits Were Bound To Fail Even If The Appeal Was Lodged

[51] I find that the most important issue in the said 188 and 373 suits is whether the title claimed by My Home Properties Sdn Bhd takes precedence over the title claimed by the plaintiff.

[52] I find that My Home Properties Sdn Bhd's title is derived from the charge lodged over the property by RHB Bank. As seen from the chronology of this case, the charge was lodged on 8 June 2004 whereas the plaintiff's caveat was only entered in 30 April 2015. My Home Properties when it purchased the said land at the public auction would have derived its title from the charge held by RHB Bank. Any dealing on the land *via* any third party, even through the proprietor of the land, would be subject to the registered charge held by RHB Bank and eventually subject to the title held by My Home Properties. This even applies to any party who lodges a subsequent caveat over the said land.

[53] I am of the opinion that the law in this area is crystal clear. It is irrefutable that the title claimed by My Home Properties Sdn Bhd takes precedent over that claimed by the plaintiff. Especially, when the plaintiff herself is aware of the existence of the said charge at the time when she allegedly bought the property from the original proprietor.

[54] I refer to the decision of the Supreme Court in *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd* [1992] 4 CLJ 2212; [1992] 1 CLJ (Rep) 112 where the fact of that case is almost similar to those appearing in the 188 and 373 suits.

[55] In *Gondola Motor Credit* (*supra*), the proprietor of the land, a company known as Tanjung Petri Enterprise Sdn Bhd had allowed a charge over its property in favour of Singapore Finance Ltd for financing to Raymond Yong. The charge was duly registered on the said property on 15 November 1981. Subsequently, Tanjung Petri then entered into a sale and purchase agreement with Almurisi Holdings where parties agreed to sell the land. Almurisi Holdings then lodged a private caveat on the land on 25 March 1986. Almurisi Holdings was aware of the charge at the time the transaction was undertaken with Tanjung Petri.

[56] Almurisi Holdings had paid substantial parts of the purchase price to Tanjung Petri by way of a series of transactions between the companies and the related directors. Tanjung Petri however failed to complete the sale which led to a suit seeking specific performance being filed by Almurisi Holdings with the company willing and able to pay the remaining sums outstanding. Judgment was subsequently entered in favour of Almurisi Holdings seeking specific performance and in the alternative damages against Tanjung Petri.

[57] On the other hand, Singapore Finance Ltd started foreclosure proceedings against Tanjung Petri for the latter's failure and the borrower's failure to comply with the terms of financing. and was sold by way of a public auction. Gondola Motor successfully submitted its bid for the said property and purchased the property for the sum of RM260,000.

[58] Title to the said property could not however be registered in the name of Gondola Motor due to the existence of the caveat by Almurisi Holdings.

[59] Therefore, like the case at hand, the issue that arose in *Gondola Motor* (*supra*) is whose title takes precedence.

[60] Harun Hashim SCJ delivering the judgment of the Supreme Court held:

> Be that as it may, assuming that the sale and purchase agreement is valid and subsisting, by Clause 1 of that agreement, Tg. Petri agreed:
>
> > ... to sell the said property with vacant possession ... from all registered encumbrances ...
>
> which means that Tg. Petri has to discharge the charge to complete the purchase. They have failed to do so and by Clause 7 the respondents have the right to enforce specific performance which they did in the 1986 suit and obtained default judgment. These matters, however, are not the concern of the appellants and do not affect their rights and interests in the land in any way. In the circumstances of this case, the only relief available to the respondents is damages *in lieu* of specific performance

A which is what they prayed for and obtained in their suit against Tg. Petri. The purpose of the caveat is to protect the interests of the respondents in the land pending the trial of the 1986 suit.

With the default judgment obtained in that suit, there is in fact and law no longer any justification for the caveat to remain on the register.

B At all material times, the option to purchase and the sale and purchase agreement were subject to the registered charge. Shaikh Mohamad was a director of Tg. Petri and in turn a director of the respondents and was well aware of the existence of the charge on the subject land. In any event, the fact of registration of the charge is notice to all the world of its existence. Any dealings subsequent to the charge and with notice of C the charge as here cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of registration up to the completion of the judicial sale and the issue of the certificate of sale.

D **[61]** The above legal proposition remains good law till today. I refer to *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 CLJ 1 where Mohd Zawawi Salleh FCJ, delivering the judgment of the Federal Court, stated:

E [30] It is pertinent to note that the principle of indefeasibility of title is one of the main features and attributes of the Torrens system of conveyance. It involves the proposition that once a person is registered as proprietor of certain land or interest in the land, he or she acquires a title that cannot be vitiated except as provided under s. 340 of the NLC. Therefore, s. 450 complements s. 89 (see *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650; *Mega Meisa Sdn Bhd* F *& Ors v. Mustapah Dorani & Another Appeal* [2020] 1 LNS 1480; [2020] 6 MLJ 594).

[31] In the premises, we agree with the submission of learned counsel for the appellant that a successful bidder at a public auction conducted under the NLC obtains an indefeasible title to the subject property and the G unregistered interest is not protected under the NLC. Every dealing or transaction of a land by a party whose interest is unregistered in the register of document cannot defeat the title of the registered proprietor.

[62] This position is also seen in the decision of the Court of Appeal in *Rohaya Ali Haidar v. AmBank (M) Bhd* [2016] 4 CLJ 563 where Prasad H Sandosham Abraham JCA (as he then was) after reviewing the applicable case law on this area including, *Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors* [1997] 2 CLJ 58; *Mui Bank Bhd v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 and *Gondola Motor* (*supra*) as well as the applicable provisos appearing in the National Land Code held:

I In our present case the earlier purchaser of the said land based on the letters of disclaimers issued by the respondent had their interest (if any) subject to the respective charges on the said lands. What the respondent should have done was to take immediate steps to redeem the land in

question or part of it but had failed to do so. *Therefore, it follows that the interest of the purchasers would be subject to the registered charge and to the appellant who acquired the registered and indefeasible interest in the said land when they had paid the said purchase price after the public auction and the certificate question of "functus officio"* and the fact that this disentitled her to grant an order setting aside the said order for sale. In our view, this by itself would be a sufficient ground to allow the appeal. (emphasis added)

[63] I also refer to *Vimala Sangari R Nathan v. Loh Chen Yook* [2018] 4 CLJ 210 and *QM Resources Sdn Bhd v. Parade Hotel Sdn Bhd & Ors* [2020] 5 CLJ 182.

[64] When I consider the written notes of the learned trial judge to the 188 and 373 suits, I find that the court did find that it was the plaintiff who had failed to inform RHB Bank of the existence of her sale and purchase agreement with Normawati and had left the same to the seller to undertake to redeem the property from the bank.

[65] It is also wrong to blame the defendants solely for the failure to inform the court in the 145 suit as to the existence of the auction of the property by RHB Bank and the sale to My Home Properties. In fact, my learned brother had held that "(i) The court is of the view that this piece of fact is a material fact which needs to be brought to the attention of MTSA before the decision in the application for summary judgment delivered on 18 June 2016, (ii) and this is the duty of Madam Premalla or her solicitor to do so and (iii) the act of withholding this material facts amounts to fraud."

[66] As a result of which, the court made the following, *inter alia*, orders against the plaintiff in the 188 and 363 suits:

(i) My Home Properties Sdn Bhd is the legitimate legal and beneficial owner of the property.

(ii) The plaintiff is not the legitimate legal and beneficial owner of the property.

(iii) The caveat entered by the plaintiff is to be removed.

(iv) The plaintiff is directed to give vacant possession of the property to My Home Properties Sdn Bhd.

[67] In other words, the plaintiff's claim to title to the said property has always been subject to the charge currently registered on the title at the time when she bought the unit from Normawati. It is clear to me that based on the orders made by the learned trial judge in the 188 and 363 suits and based on the evidence before me, the plaintiff knew that the property was charged to RHB Bank.

[68] I also find that one of the terms of the sale and purchase agreement between Normawati and the plaintiff, Normawati was required to redeem the said property from RHB Bank. This was not done by the plaintiff at any material time, and it is clear from the evidence before me that she was aware of this requirement.

[69] In fact, I believe the plaintiff was aware of this requirement at the time the 188 and the 363 suits were heard.

[70] In the 188 and 363 suits, the following were elicited from the plaintiff during cross-examination:

DC : So, do you agree with me that before Pn Normawati obtain consent from RHB Bank, she cannot sell it to you?

PW-1 : Yes, I agree.

DC : For this ... for the Sale and Purchase of this property, you paid RM290,000 ....

PW-1 : Yes, I agree

DC : To Normawati?

PW-1 : Yes.

DC : Despite knowing that there is a charge?

PW-1 : Yes, I agree

DC : Okay. So you took the risk that she might not be pay for her housing loan to RHB Bank? Under the ...

PW1 : You mean the last ... the balance of what was in the Bank or ...

DC : No. Because she has been borrowing money from you, right?

PW-1 : Okay, alright.

DC : And ... so you took the risk that she might not be ...

PW-1 : Are you talking about monthly installment or ...

DC : Yes. Monthly installment to RHB Bank, the housing loan.

PW-1 : Right. It was supposed to help her with payment for the installment as well.

PW-1 : Not only the monthly installment but some trouble that she was going through.

DC : And when you take action, the specific performance suit against Normawati, you did not name RHB as the parties to the suit despite RHB being charge?

PW-1 : No. I did not.

[71] Therefore, the plaintiff is aware from the outset that her interest, if any to the property, is always subject to the charge over the land lodged by RHB Bank. Even in the sale and purchase agreement, the plaintiff and Normawati agreed that there is a need for the seller to fully redeem the property and transfer the title to the plaintiff.

[72] As stated in para. 67, the plaintiff also claimed for the right to redeem the property from RHB Bank as part of the order for specific performance in the 145 suit.

[73] Based on the above, I believe parties to this suit are well aware that the plaintiff's claim to the title, if any, to the property at issue is subject to the registered interest of RHB Bank that was lodged first. Her rights to the property do not take precedent to RHB Bank and the plaintiff should have discharged the loan outstanding to the said bank before she could have any right to the said property.

[74] Interestingly, in the 145 suit, the plaintiff had specifically sought the following orders against Normawati:

(i) Damages for breach of contract to be assessed against Normawati.

(ii) The plaintiff is allowed to redeem the said property from RHB Bank.

[75] I do not accept the plaintiff's allegations that the failure to inform the previous court lies solely on the defendants. Instead, the grounds of the learned trial judge indicate that the failure to inform the court of the full facts and the finding of the alleged fraud leading to the impeachment of the orders made in the 145 suit were also made against the plaintiff as well. I reproduce the notes of the learned judge in 183 and 363 suits:

> 1. (iv) Madam Premalla failed to notify RHB Bank about the SPA and left it to Normawati to do so even though Madam Premalla had paid the full purchase price to Normawati;
>
> (2) The court is of the view that this piece of fact is a material fact which need to be brought to the attention of the MTSA before the decision in the application for summary judgment delivered on 28/6/16.
>
> (3) and this is the duty of Madam Premalla or her solicitor to do so.
>
> (4) the act of withholding this material facts amounts to fraud.

[76] Given the above, it is incorrect for the plaintiff to merely cast the aspersions of the failure to inform the court in the 145 suit of the foreclosure proceedings by RHB Bank and the eventual purchase by My Home Properties solely against the defendants. The plaintiff being a litigant is also responsible to ensure all the facts are present before court before the decision for summary judgment was delivered.

[77] I find that only Leslie Bala and the plaintiff's husband were present when the decision was delivered by the High Court in the 188 and 363 suits. This is seen from the excerpts from the notes of evidence:

> DC1 : Right. This is (01:01:26 inaudible), I carry on, My Lord. Mdm Premalla, just now I was asking you about the date the judgment was pronounced. This is the judgment, it was pronounced on 11.03.2019.
>
> You can see it on page 313. Correct?

SP1 : Yes, that's correct.

DC1 : Right. And if you look at page 1 ... the next page?

SP1 : Yes.

DC1 : If you look at the end of the first paragraph, the person who attended was Mr Leslie Bala. Am I right?

SP1 : Yes, that's -

DC1 : Yes, so my client the Second defendant wasn't the

SP1 : Yes.

DC1 : Right. That's all, Mdm Premalla. Don't worry. It's just quite formal question. Now let me go back to the other question I was asking you. Were you there in court that day, because Mr Leslie Bala has instructed me that your husband and you were in court that day?

SP1 : I cannot recall, but I don't think I was in court on that day. I do not recall. I know I was there for the trial

[78] Leslie Bala confirmed that he had informed the plaintiff's husband that the chances of success were weak and that an appeal should not be lodged. Although this evidence was not reproduced in writing, the defendants' evidence, I find is consistent and did withstand rigorous cross-examination by the plaintiff's counsel.

[79] Instead, I am of the opinion that the plaintiff's witnesses were unreliable and kept changing their position throughout the case. This is apparent when I consider the following excerpts from the notes of evidence:

PW1's testimony

DC1 : Alright. So, I would like to ask you this. These receipts were obviously not given at the time you gave her the money. It was after the fact. Am I right?

SP1 : Yes, that's correct.

PW1's testimony

DC1 : Question was, 'Are there any documents to show that these payments were actually made to Normawati? Yes.' And this is what you say in your witness statement. 'Normawati issued receipts every time I make payment for the purchase of the property. The receipts are dated', and it goes on. 'All which were signed by Normawati.' So, I am suggesting to you, Madam.

SP1 : Yes. DC1: You are lying in Question Answer 8 or you have just lied when I asked you when the receipts were obtained by you. So, which one is it? What is the truth?

SP1 : I am, I would have written it wrongly on Question 8 but what we discussed earlier would be truth.

DC1 : So, Question 8 is wrong, Answer 8 is wrong?

SP1 : Answer 8 would be wrong, yes.

PW1's testimony

YA : The question is, the fact that you say that you knew the auction after 22.06.2016 is incorrect. You answer yes or no.

SP1 : Oh sorry, Yang Arif. For me I read it as, 'The bidding has,' in the bidding was successful, and that the property was bought by My Home Properties. As of the auction, yes, I knew of it at the time when I was informed by Keshava, yes.

[80] I, therefore, find that it is most likely than not that the defendants would have advised the plaintiff that the chances of success of the appeal are slim and that she should not proceed with the appeal. A reasonable competent solicitor or counsel would have taken all the evidence, legal proposition, and these facts into account when he or she advise the plaintiff as to whether an appeal should be pursued. I find that the evidence indicates that the defendants did discharge their duties to the plaintiff as required by law.

[81] For clarity, I hereby state that I prefer the evidence of the defendants' witnesses on this issue, and I find that the evidence of the plaintiff's witnesses is unreliable and inconsistent with their own written testimonies and the contemporaneous documents.

[82] Even if I were to disregard the evidence of the defendants' witnesses, it is important to note that the burden of proof lies solely with the plaintiff. This is clear from s. 101 and s. 102 of the Evidence Act 1950.

[83] An explanation of how the above are to be applied by a court of law, can be gleaned from the decision of the Court of Appeal in *CB Media Sdn Bhd & Anor v. Kesas Sdn Bhd* [2019] 4 CLJ 609 where Stephen Chung JCA held:

> [19] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lay had discharged that burden, then the evidential burden shifted to the other party. But if the party on whom the burden of proof lay failed to discharge it, the other party need not call any evidence: *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; [2017] 5 MLJ 398.

[84] This is also explained by the Court of Appeal in *Unsung Rasad v. PP* [2019] 1 LNS 662 as follows:

> In the celebrated case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:
>
> > *If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

A [17] That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, *to reach a level of proof of at least 51% probability against his adverse party*. We would cite the English case of *Re B* [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of
B having judgement entered in his favour, like so:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either
C happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. *If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*. (emphasis added)

D **[85]** I further refer to the decision of the Federal Court in *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885, where Abdul Hamid Embong FCJ held:

E [13] The standard of proof in civil cases is the legal standard to which a party is required to prove its case, namely on a balance of probabilities. In civil litigation, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. In the case of *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord
F Denning said the following about the standard of proof in civil cases:

> *The ... [standard of proof]... is well settled. It must carry a reasonable degree of probability ... if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.* (emphasis added)

G **[86]** Having considered and applied the above principles to the evidence of the plaintiff's witnesses, I am not convinced on a balance of probabilities that the defendants' advice not to appeal was predicated by their own personal motivation as suggested. I believe that the evidence, the legal positions, and the contemporaneous documents suggest that the appeal would have failed in
H any event. It was appropriate for the defendants to give such advice to the plaintiff in view of the facts of this case. I do not believe she had any credible chance of success even if an appeal had been lodged to the Court of Appeal.

[87] As such, it is more likely than not that the defendants would have advised not to appeal as the claim is obviously weak and the appeal would
I have most likely failed. I, therefore, find that the defendants did not breach their duty of care to the plaintiff.

Alleged Breach Of Fiduciary Duty

[88] During the proceedings, counsel for the plaintiff had intimated to me that her client is only pursuing the claim either for negligence or for breach of promise to compensate the plaintiff for the said land.

[89] Therefore, this claim for the alleged breach of fiduciary duty falls to the side and is no longer relevant for the purposes of this suit.

[90] Even if I am wrong on the above, I do not find that the defendants had acted in breach of their fiduciary duty to the plaintiff.

[91] I agree that the defendants, as counsels for the plaintiff, owed her fiduciary duties. This is trite as the relationship of trust and confidence that exists between an advocate and his client. See *Lee Ah Kong v. Ong & Company* [2011] 5 CLJ 296; [2011] 1 MLJ 426.

[92] However, I do not see any evidence of the breach of the said fiduciary duty against the defendants. I find that they have discharged their obligations to the plaintiff and had discharged their duties to her.

[93] I also do not find any evidence that the defendants had either put their interest first to that of the plaintiff or had concealed any information or facts that could be utilised by the plaintiff for the purposes of the trial or appeal. The no-conflict rule and no-profit rule, owed by fiduciaries as laid down in the leading case of *Keech v. Sandford* [1726] Sel Cas T King 61, were not breached by the defendants in any form whatsoever.

[94] I am reminded of the often-quoted *dicta* of Lord Herschell in *Bray v. Ford* [1896] AC 44:

> it is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

[95] I also refer to the decision of Millet LJ in *Bristol and West Building Society v. Mothew* [1996] EWCA Civ 533 where he stated:

> The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the

A defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977 ed.p. 2), he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[96] The allegation here is that the defendants had ignored the plaintiff's B interest and gave preference to their own personal issues that may arise in that case. This allegedly relates to the finding made by the trial judge in the earlier case and the alleged fraud by the defendants.

[97] However, after considering the pleadings, notes of evidence and the orders of the courts made in the previous proceedings, I do not find that the C plaintiff's contentions have been proved. What is shown is that the title of the My Home Properties takes precedence over those claimed by the plaintiff and it was the failure of the plaintiff to inform court that lead to the decision in the application for summary judgment delivered on 28 June 2016. As I have found earlier, this duty lies also with the plaintiff, and it is wrong for D her to now point the finger solely against the defendants.

[98] Further to the above, I also do not find sufficient evidence that the defendants' advice was predicated by the decision to hide any alleged fraud by the defendants. The said fraud as alleged, if any, had occurred and would not change even if the appeal was not pursued. It would not make any E difference to the existence of the alleged "fraud" as suggested by the plaintiff. In this case, I opine that the defendants had taken an objective view of the totality of the case and advised her not to appeal. There is nothing wrong with that. I find that a reasonable advocate and solicitor would have given the same advice.

F **[99]** For the above reasons, I find that the plaintiff has failed to discharge its burden of proof to show that the defendants were negligent and had acted in breach of their fiduciary duty to her.

Alleged Admission And Promise To Compensate

G **[100]** On the issue of whether the defendants had admitted to liability and agreed to compensate the plaintiff, I also do not find sufficient credible evidence in favour of the plaintiff.

[101] The defendants, in particular the second defendant, admits that he had in fact met the plaintiff's husband in the presence of various parties including H his wife and the third witness.

[102] It is unclear whether the plaintiff did attend the meetings after the trial. What is clear, is that parties agree that the conversation was concerning the outcome of the 188 and 363 suits.

I

[103] I note that the plaintiff contends that the defendants had admitted being negligent and alleged that the second defendant had agreed to repay her at the very least the full value of the property lost, or if possible, purchase the said property from the My Home Properties Sdn Bhd. This view was supported by the plaintiff's third witness, PW3.

[104] Nonetheless, I find that the plaintiff's third witness, PW3, had a long-standing personal relationship with the plaintiff and her husband. He had appeared many times as a witness for the plaintiff in previous cases. It is also not clear why he was present at the said meeting and why his attendance was necessary in the first place. It is also not clear whether he was at the table where the discussion took place, or he was simply sitting at an ancillary table to the parties. This was not established by the plaintiff. I, therefore, do not lend much credence to the evidence of the plaintiff's third witness, PW3, on this issue.

[105] The second defendant however contends that he had only agreed to lend the plaintiff funds to enable her to purchase the property. He had also attempted to purchase the said property on behalf of the plaintiff with conditions attached. He contends that the offer that was made by him was a compromise to remove the issues with the plaintiff and he felt intimated by the plaintiff's husband at the material time. He also alleges that the purchase of the property with My Home Properties had fallen through due to circumstances beyond his control.

[106] In view of this conflicting position, it is inevitable that this court would have to resort to contemporaneous documents that were made at the material time to see which version of events is correct.

[107] I refer to the often-quoted judgment of Robert Goff LJ in *Armagas Ltd v. Mundogas (The Ocean Frost)* [1985] 1 Lloyd's Rep 1:

> Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the judge did not pay sufficient regard to these matters in making his findings of fact in the present case.

[108] Arden LJ in *Wetton v. Ahmed (Also Known As Mumtaz Properties Ltd)* [2011] EWCA Civ 610 emphasised:

> … contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it.

A

> It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

B

[109] Much assistance can be gleaned from the judgment of Legatt J in *Gestmin SGPS (SA) v. Credit Suisse (UK) Ltd* [2013] EWHC 3560 where he stated:

> 15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 22. In the light of these considerations, *the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth. (emphasis added)

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[110] In light of the above, I find that the evidence of the defendants, especially that of the second defendant, is more credible on this issue when I compare his evidence to what was actually written between parties at the material time.

G

[111] Helpfully, the defendants had the correct state of mind to send an email dated 15 May 2019 to the plaintiff enclosing a draft statutory declaration containing a draft proposal for settlement and subsequently a WhatsApp message to the plaintiff's husband dated 13 July 2019 that also explains the discussions and the offer made by the second defendant.

H

[112] When I consider these two documents, it is obvious to me that the discussions centred around a proposal by the second defendant to settle the claims that the plaintiff may have against him and in return that the plaintiff agrees that she will not pursue any claims against the second defendant. This was not agreed to by the plaintiff and the discussion fell through.

I

[113] Under those circumstances, I cannot consider that the defendants had admitted to any form of liability to the plaintiff. The proposal for settlement was not agreed to by the plaintiff and therefore could not be considered as a form of admission in any way against the defendants.

[114] I am guided by the decision of the Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 and the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133.

[115] It is clear that the conditions as suggested by the second defendant were not agreed to by the plaintiff. The plaintiff did not execute the statutory declaration and had chosen instead to pursue the claim against the defendants. Therefore, I cannot find that there was any form of admission as suggested by the plaintiff as the overtures made by the second defendant were clearly an attempt to settle the dispute.

[116] Having chosen not to agree to the terms offered, it is wrong for the plaintiff to now resurrect this issue through an alleged admission of liability. This allegation clearly contradicts the two documents that were written and produced by the second defendant at the material time. There was also no response from the plaintiff or her husband to the email and the WhatsApp communication. Therefore, for the above reasons, I do not believe that the plaintiff has proven her claim against the defendants.

Negligible Chances Of Success Of Any Appeal

[117] Even if I am wrong on the above, I also find that the plaintiff has failed to show that she has suffered any form of damages for the failure to appeal to the Court of Appeal or for the alleged wrong advice given to the plaintiff.

[118] It is obvious to this court that, based on the authorities reproduced earlier, that her claim and her defence against the title claimed by My Home Properties Sdn Bhd is unsustainable. The appeal would have been futile in any event as the title claimed by My Home Properties Sdn Bhd is beyond refute based on the facts found by the learned trial judge in the suits in Shah Alam.

[119] I am aware that generally, it is wrong for a solicitor to refute or claim that his or her client has a weak case when dealing with a loss of chance claim. This could be seen in the decision of Vazeer Alam JC (as he was then) in *Tenaga Nasional Bhd v. Tetuan Ariff & Co* [2014] 1 CLJ 1112 and in *Muthiah Ramasamy v. Muguthan Vadiveloo* [2022] 7 CLJ 940.

[120] However, with all general rules, there are always exceptions. This is one of those cases where the defendants are entitled to rely on the lack of a genuine chance of success on the part of their client and the fact that they did advise the client not to appeal. This is not one of those cases, where the solicitor or counsel has merely missed the dateline for filing a notice of appeal or the failure to appear in court that leads to the dismissal of a suit.

[121] This approach could also be seen in the English Court of Appeal decision in *Mount v. Barker Austin* [1998] EWCA Civ 277. It is sufficient that I reproduce the judgment of Simon Browne LJ:

A With these considerations in mind I would state the applicable principles as follows:

(1) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value *ie*, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success. (I say 'negligible' rather than 'speculative' – the word used in a somewhat different context in *Allied Maples Group Limited v. Simmons & Simmons* [1995] 1 WLR 1602 – lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)

(2) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

(3) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

(4) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. To my mind it is rather at this stage than the earlier stage that the principle established in *Armory v. Delamirie* (1722) 1 Stra 505 comes into play.

[122] I also find that the plaintiff's reliance on s. 267 of the National Land Code and *AIM Edition Sdn Bhd v. AmBank (M) Bhd* [2019] 9 CLJ 127; [2020] 10 MLJ 637 are also misconceived. The case concerns the alleged breach of the contract for sale of the property under auction and the difference in the description as to the size of the property sold. The principles there do not fall within the scope of the case at hand.

[123] For the above reasons, I find that the defendants have shown to my satisfaction that the prospect of success is so low that the appeal is negligible and does not justify any form of damages to be imposed against them.

The Plaintiff's Transaction With Normawati Is Moneylending And Is Unlawful

[124] I also find that the original transaction between Normawati and the plaintiff reeks of an unlawful moneylending transaction and the said sale and purchase agreement is merely a sham to hide the true intention of the parties.

[125] I refer to the judgments of the Court of Appeal in *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1 and *Mahmood Ooyub v. Li Chee Loong & Other Appeals* [2020] 1 LNS 660.

[126] Based on the judgments of the Court of Appeal in the two cited cases, I opine that the applicable principles of law in this area could be summarised as follows:

(i) As a general rule, a court of law should uphold the sanctity of agreements and should not rewrite the terms that have been agreed to and contained in the written instrument.

(ii) However, there are exceptions to the above general rule. One of the applicable exceptions concerns the situation where the agreement is shown to be a sham.

(iii) To determine whether the agreement is a sham, a court of law should ascertain whether the parties intended not to be bound by the written instrument.

(iv) To ascertain this subjective intent, this court is not limited to the terms appearing in the said agreement but is entitled to take into account parties' explanations and circumstantial evidence such as evidence of the subsequent conduct of the parties.

(v) The answer to the question of whether the agreement is a sham will depend on the facts of each case as found by the trial judge.

(vi) Simply put, no case is alike but various factors may assist the court in its task which includes, among others:

(a) Whether parties were represented by their own choice of solicitors;

(b) Did the pre-contractual relationship indicate there was an intention to enter into a genuine sale and purchase agreement;

A (c) Did the agreement contain what would normally be expected in a similar instrument;

(d) Did parties comply with the terms of the agreement;

(e) If they failed to comply with the terms, whether they had any
B reasonable explanation for such failure;

(f) If the terms of the contract do not appear to be commercially real or are suspicious, whether there is any explanation provided to explain the same;

C (g) Parties' conduct after the agreement was executed.

[127] Having considered the evidence presented before me, it is clear to me that the original transaction between the plaintiff and Normawati is a money lending transaction. I say this for the following reasons:

D (i) The plaintiff kept changing her story, from it being a genuine sale and purchase transaction to it subsequently being a sale to enable the said Normawati to pay for the earlier personal loan given by the plaintiff.

(ii) The payments of the sums of monies to Normawati for the alleged loan/purchase were paid or disbursed to the seller/borrower by the
E plaintiff in stages from 6 July 2013 to 1 October 2014.

(iii) The sale and purchase agreement were only entered on 5 January 2015 nearly two years after the first payment was made by the plaintiff to Normawati.

F (iv) At the time the transaction took place, the property's market value is to the sum of RM435,000 whereas the alleged agreement to sell was only to the sum of RM290,000.

(v) No solicitors were involved in the said transaction.

(vi) The plaintiff took a substantial risk in making payment upfront when
G she was aware that the said Normawati had charged the property to RHB Bank.

(vii) There is no evidence that the plaintiff sought solicitors' advice or any attempt to pay the mortgage due to RHB Bank. A genuine purchaser would not have paid the full purchase price in full without ensuring
H that no third party has any overriding interest over theirs.

(viii) Despite being aware of RHB's charge, the plaintiff did not inform RHB Bank of her purported purchase and did not attempt to pay the full sums outstanding to protect her interest.

I (ix) The plaintiff made full payment despite not receiving vacant possession of the property and before securing any form of interest over the property in accordance with the National Land Code.

[128] The above facts as gleaned from the testimony of the witnesses, especially that from the plaintiff during cross-examination, bear the hallmarks of a money lending transaction. The conduct of the plaintiff does not bear the hallmarks of a genuine purchaser.

[129] Given the above, I find that the purported said sale and purchase agreement between the plaintiff and Normawati is an unlawful instrument and contravenes ss. 2 to 5 and 15 of the Moneylenders Act 1951 as well as ss. 24 and 25 of the Contracts Act 1950.

[130] As the said transaction is an unlawful transaction, I opine that the plaintiff is not entitled to pursue a claim based on the said unlawful instrument and this extends to any claim of negligence or breach of fiduciary duty against the defendants. The plaintiff cannot enjoy the fruit of a poisonous tree, especially when she must rely on the said instrument to constitute her claim against the defendants. This position can be seen in the decision of Ong Chee Kwan JC (as he then was) in *Golden Wheel Credit Sdn Bhd v. Dato' Siah Teong Din* [2021] 9 CLJ 461.

[131] I make the above findings pursuant to the remarks made by Peh Swee Chin SCJ in *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281:

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.

[132] I also refer to the decision of the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 and the Privy Council in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 where the above principle have also been enumerated.

Summary And Orders Of This Court

[133] For the above reasons, I dismiss the plaintiff's claim with costs of RM50,000 subject to the allocator, taking into consideration the seniority of counsels involved, the complexity of the case, the number of days of trial and the importance of the claim to the litigants.